(2)

No. 85-1233

IN THE

Supreme Court of the United States

October Term, 1985

INTERNATIONAL PAPER COMPANY,

Petitioner,

vs.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION

PETER F. LANGROCK
EMILY J. JOSELSON
LANGROCK SPERRY PARKER & WOOL
Counsel for Respondents
Drawer 351
Middlebury, VT 05753
(802) 388-6356

JEFFREY L. AMESTOY, Attorney General
MERIDETH WRIGHT, Assistant Attorney General
Attorneys for State of Vermont as Class Member
Pavilion Building
Montpelier, VT 05602
(802) 828-3171

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

20 pp

Question Presented

Does the Federal Water Pollution Control Act prohibit an action by property owners, in the Vermont federal district court under Vermont common law, for damages to their Vermont lakeshore properties caused by the discharge of pollutants by a private business enterprise into the boundary waters between New York and Vermont?

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases:

IN THE

Supreme Court of the United States

October Term, 1985

No. 85-1233

INTERNATIONAL PAPER COMPANY,
Petitioner,

vs.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Harmel Ouellette and Lila Ouellette, *et al.* ('Respondents'), respectfully pray that this Court deny the Petition of International Paper Company ('Petitioner') for review of the opinion of the United States Court of Appeals for the Second Circuit, which affirmed *per curiam* the decision of the United States District Court for the District of Vermont (Honorable Albert W. Coffrin, Chief Judge), entered February 5, 1985.

Counterstatement of the Case

Respondents are 162 owners of lands on the shores of Lake Champlain within the towns of Shoreham, Bridport and Addison, Vermont (JA 33, 186).[1] Respondents use their property primarily for residential and recreational purposes, but also for certain commercial uses such as rental cottages and marinas (JA 189-190). Petitioner is a New York corporation with its principal place of business in New York, and is registered to do business in the State of Vermont (JA 10, 25). It owns and operates a kraft paper mill on the shores of Lake Champlain, opposite Respondents' properties, approximately four miles north of the Village of Ticonderoga, New York. The State of Vermont, as a landowner, is a member of this class action and appears through its Attorney General (JA 6).

Lake Champlain is a navigable body of water and is the largest fresh water lake east of the Great Lakes. It extends from Whitehall, New York, into Canada. The Vermont-New York border is the middle of the deepest channel of Lake Champlain. "An Act . . . Declaring What Shall be the Boundary Line Between the State of Vermont and the State of New York . . .," *Vermont Laws of 1790*; N.Y. State Law, Sec. 4 (McKinney 1984).

[1] "JA" citations are to the Joint Appendix in the Court of Appeals.

Petitioner discharges wastes from its mill into Lake Champlain through a diffusion pipe. The location of the pipe, which runs in a straight line from the New York shoreline toward Vermont and ends approximately 200 feet from Vermont waters, is shown on two maps at JA 31-32.

This suit was instituted in 1978 as a class action seeking injunctive relief and damages for losses resulting from water and air pollution caused by Petitioner's mill. Respondents filed the action in a Vermont state court, but Petitioner removed it to the United States District Court for the District of Vermont, pursuant to 28 U.S.C. §1441(a) (JA 35). In the First Cause of Action, Respondents seek relief from discharges of pulp and paper making wastes which are "foul, unhealthy, smelly, and aesthetically unpleasing and discolor the waters in, around and adjacent to plaintiffs' lakeshore properties, and the lakeshore properties of other members of the class, make said waters turbid, and make them unfit for recreational use." (JA 12). These discharges "interfere with [Respondents'] use and enjoyment of their property and have diminished and will continue to diminish the fair market value and rental value of their property." (JA 12).

Count I alleges that discharges from Petitioner's mill into Lake Champlain constitute a "continuing nuisance" (JA 12); Count II alleges that Petitioner has violated its National Pollutant Discharge Elimination System permit ("NPDES" permit) by discharging pollutants into the Lake in excess of the amounts specified in the permit (JA 13-14); Count III alleges that Petitioner's discharges constitute an unreasonable riparian use (JA 15); Count IV alleges that its discharges were negligent (JA 16-17); and Count V alleges such discharges were malicious,

willful, and undertaken with reckless and wanton disregard of Respondents' rights (JA 17-19). Respondents seek money damages and injunctive relief. Respondents' second cause of action concerns air pollution (JA 19-23), and is not at issue here.

On June 22, 1981, Petitioner moved to dismiss Respondents' first cause of action, pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure. On February 5, 1985, Chief Judge Coffrin held that Respondents could proceed in Vermont court under Vermont common law. *Ouellette v. International Paper Co.*, 602 F.Supp. 264 (D.Vt. 1985) ("*Ouellette*") (A4-25).[2] On May 20, 1985, Chief Judge Coffrin certified for interlocutory appeal three issues pursuant to 28 U.S.C. §1292(b), and stayed all further proceedings with respect to the first cause of action pending the decision by the Court of Appeals.

The Court of Appeals accepted Petitioner's interlocutory appeal and thereafter affirmed the District Court's denial of its motion to dismiss, in a one-page *per curiam* opinion "essentially for the reasons set forth in [the District Court's] thorough opinion, which we adopt in all respects. . . ." (A3). Petitioner seeks review of the Court of Appeals' decision on the first of these three certified issues.

[2] "A" citations are to the Appendix contained Petitioner's Petition for Certiorari, filed with this Court on January 22, 1986.

ARGUMENT

Introduction

Petitioner does not maintain, nor can it, that the Federal Water Pollution Control Act, 33 U.S.C. §§1251 *et seq.* ("FWPCA") preempts state common law actions for pollution-caused damages. A review of the FWPCA itself and its legislative history confirms the conclusion that Respondents' state common law rights were in no way impaired or preempted by passage of the Act. Not only did Congress *not* manifest a clear intention to preempt state common law remedies in passing the FWPCA: it expressly acknowledged the existence of such remedies and clearly preserved them. 33 U.S.C. §1365(e), the so-called "savings clause," provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation *or to seek any other relief* (including relief against the Administrator or a State agency).

Id. (emphasis added). Nothing could be a clearer indication of legislative intent to preserve state common law rights.

The legislative history of the FWPCA provides even more persuasive evidence that Congress intended the saving clause to preserve rights already enjoyed by citizens. The Senate Report accompanying 33 U.S.C. §1365(e) states:

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. *Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.*

S.Rep. No. 92-44, 92d Cong., 2d Sess. 81, *reprinted in* 1972 *U.S.Code Cong. & Ad.News* 3668, 3746-47 (emphasis added) (cited in *Ouellette*, 602 F.Supp. at 269) (A12-13).[3]

Moreover, nothing in this Court's decisions in *Illinois v. Milwaukee*, 406 U.S. 91 (1972) ("Milwaukee I"), or *Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("Milwaukee II"), compels a different conclusion. In *Milwaukee I*, this Court was called upon to create a forum within which a state plaintiff could sue the political subdivisions of a sister state, in order to regulate the latter's pollution-causing activities. *Id.*, 406 U.S. at 93, 104-05. *See also*, *Milwaukee II*, 451 U.S. at 309. Since Illinois, a quasi-sovereign, was precluded by the dictates of federalism from pursuing its claims in state court, *Milwaukee I*, 406 U.S. at 94-98, 104; *Milwaukee II*, 451 U.S. at 309, 325, and since no federal statutory remedy then existed, *Milwaukee I*, 406 U.S. at 103, this Court recognized the federal common law of nuisance as a "necessary expedient" to provide the plaintiff state with a federal court forum. *Milwaukee II*, 451 U.S. at 313-14 (quoting *Committee for Consideration of Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976)). *See generally* S. Bleiweiss, "Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption," *Harv.Envtl.L.Rev.* 41, 44-45 and n.36 (1983).

Thus, in *Milwaukee I* this Court had neither reason nor occasion to discuss the continued existence of state common law remedies in cases where such remedies would otherwise be available; that is, in cases not between quasi-sovereigns, but between private persons suing other private entities for injuries to themselves or their property. The limited nature of this holding was

[3] See also Statements of Sen. Stafford, *Cong. Rec.* S11305-07 (daily ed. Sept. 12, 1985).

made clear in this Court's subsequent opinion in *Milwaukee II*. There, this Court held that the recently recognized federal common law of nuisance had been preempted by the passage of the FWPCA, which provided just the sort of federal regulatory scheme for control of interstate pollution sought by Illinois in its suit. *Id.*, 451 U.S. at 319-20. Having available to it applicable federal statutory law, Illinois no longer had to resort to the "necessary expedient" of federal common law. *Id.*

Therefore, in *Milwaukee II* this Court had no occasion to discuss the continued vitality of state common law remedies,[4] except to make clear that its preemption analysis was not to be construed as affecting state common law:

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law preempts state law. In considering the latter question " '*we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.*' "

Id. at 316 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 219, 230 (1947)) (emphasis added). In a footnote, this Court cautioned against extending its preemption analysis to state law remedies:

[4] The only issue on which certiorari was granted in *Milwaukee II* was whether the FWPCA preempted federal common law. This Court subsequently denied Illinois' petition for certiorari challenging the Seventh Circuit's refusal to consider the plaintiff's claims under state common law. *Illinois v. Milwaukee*, 599 F.2d 151 (7th Cir. 1979), *Illinois' petition for cert. denied*, 451 U.S. 982 (1981).

> Since the States are represented in Congress but not in the federal courts, the very concerns about displacing state law which counsel against finding preemption of *state* law in the absence of clear intent actually suggest a willingness to find congressional displacement of *federal* common law. *Simply because the opinion in Illinois v. Milwaukee used the term "preemption," usually employed in determining if federal law displaces state law, is not reason to assume the analysis used to decide the usual federal-state questions is appropriate here.*

Id. at 317, n.9 (emphasis partly in original, partly added).

This Court also made clear that in *Milwaukee I*, federal common law remedies were necessitated only because state common law was unavailable to Illinois:

> In this regard we note the inconsistency in Illinois' argument and the decision of the District Court that both federal and state nuisance law apply to this case. *If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used.*

Id., 451 U.S. at 314, n.7 (emphasis added). Thus, although federalism concerns precluded Illinois' reliance on its own state law to establish liability against another state's political subdivisions, such constraints simply do not exist where private parties seek remedies for injuries held compensable under their own state common law. Clearly, in such cases "state common law can be applied, [and] there is no need for federal common law." *Id.*

Indeed, this Court itself found state law to control at the time the FWPCA was passed:

> It must be noted that the legislative activity resulting in the 1972 Amendments largely occurred prior to this Court's [1972] decision in *Illinois v. Milwaukee* [*Milwaukee I*]. Drafting, filing of

> Committee Reports, and debate in both Houses took place prior to the decision. Only conference activity occurred after. It is difficult to argue that particular provisions were designed to preserve a federal common law remedy not yet recognized by this Court.

Milwaukee II, 451 U.S. at 327 n.19 (quoted in *Ouellette*, 602 F.Supp. at 269-70, and referring to *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493 (1971) (A14).

For these sound reasons, the Second Circuit affirmed Chief Judge Coffrin's determination that state common law remedies survived passage of the FWPCA:

> Consideration of the express language of the saving clause and state authority provision of the Act, the legislative history, and the stated objectives of the Act inevitably leads one to the conclusion that Congress intended to authorize resort to state nuisance law in situations such as the instant one.

Ouellette, 602 F.Supp. at 272 (A19-20).

Thus, rather than arguing that the FWPCA preempts Respondents' cause of action, Petitioner argues that Respondents can only sue (1) in New York courts, and (2) under New York law. In so arguing, Petitioner is asking the courts to develop a new common law rule of subject matter jurisdiction: only the courts of the state where industrial pollution originates have subject matter jurisdiction to hear actions for damages caused by the pollution. Since, obviously, Vermont federal courts can apply New York law as well as New York federal courts, if that is required, the only possible basis for Petitioner's argument to disqualify Vermont federal courts is the one stated in the petition: bias and local prejudice on the part of Vermont federal courts. Pet. at 6.[5] These

[5] "Pet." citations are to the Petition for Certiorari, filed with this Court on January 22, 1986.

allegations, which insult and misapprehend the role of the federal judiciary, hardly merit full attention in this brief.

Petitioner's second contention, that New York rather than Vermont common law must be applied, is itself a "red herring". Not only is the question not dispositive of the underlying motion to dismiss, but there have been absolutely no demonstrated differences between New York's common law of nuisance or negligence, and that of Vermont.

Petitioner ultimately looks to the opinion of the Seventh Circuit Court of Appeals in *Illinois v. Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *as amended*, Nos. 77-2246 and 81-2236 (7th Cir. May 29, 1984), *cert. denied sub nom. Scott v. City of Hammond*, 105 S.Ct. 979 (1985) ("*Milwaukee III*"), as the basis for its Petition. However, the Vermont District Court closely examined this opinion and, given a very different set of facts, reached a different result. Despite disagreement in the analysis used by Chief Judge Coffrin and the Seventh Circuit, and given the significant, underlying factual differences, the holdings of the two cases are not inconsistent. For this reason, there is no conflict between the Circuits to justify certiorari in this instance.

The decision below is not in conflict with, and is wholly distinguishable from, the decision by the Court of Appeals for the Seventh Circuit in *Milwaukee III*.

Petitioner's primary argument in support of its petition for certiorari is that the "decision below directly conflicts with the decision of the Seventh Circuit in *Milwaukee III*." Pet. at 5. A close analysis of these cases, and of this Court's decisions in *Milwaukee I* and *II*, reveals that no such conflict exists.

Respondents respectfully submit that the Seventh Circuit decision is distinguishable on its facts, in two important respects, from that of the Second Circuit. Most importantly, *Milwaukee III* involved a suit between quasi-sovereign states and their political subdivisions. *Id.*, 731 F.2d at 404-05, 407.[6] In the instant suit, private landowners are suing a private business enterprise. *Ouellette*, 602 F.Supp. at 271 (A18).

Moreover, in *Milwaukee III*, one state was seeking to regulate and control the effluent levels discharged by its sister state's political subdivisions into interstate waters. *Id.* Here, Respondents seek compensation for injuries caused to their properties by Petitioner, a private business entity discharging pollutants within a mile of their shoreline, and injunctive relief to minimize the likelihood that such pollution will continue to damage their properties. *Ouellette*, 602 F.Supp. at 171 (A18). Thus, while the opinion rendered by Seventh Circuit speaks to issues arising between quasi-sovereigns concerning regulation of interstate water pollution, that of the Second Circuit simply addresses common law actions between private entities for damages resulting from tortious conduct. As such, the cases present no conflict necessary for resolution by this Court.

Nor does the Court's ruling in any way alter the balance of power between the federal government and neighboring states, "render meaningless the permit scheme of the FWPCA," or place Petitioner in the position of being subject to potentially conflicting

[6] As the Seventh Circuit pointed out, "[i]t may well be significant . . . that, except for the case in which Scott is plaintiff, these are attempts by a state to regulate municipalities of another state in the discharge of their public responsibilities." *Milwaukee III*, 731 F.2d at 407. Notably, Scott was then dismissed from the suit by the Circuit Court for lack of standing. *Id.* at 415-16.

regulation by a multiplicity of entities. Pet. at 5-6. Federalism issues simply do not arise where private parties sue each other for injuries resulting from wrongful acts, even if the parties are from separate states. In fact, state law has historically been relied upon to resolve just such disputes:

> A person who sets in motion in one state the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it. Thus, liability is commonly imposed under such circumstances for homicide, for maintenance of a nuisance, for blasting operations, and for negligent manufacture.

Young v. Masci, 289 U.S. 253, 258-59 (1933) (citations omitted) (cited in *Ouellette*, 602 F.Supp. at 270) (A15).

Moreover, Petitioner's contention that it will now be subject to conflicting regulatory schemes is without merit. Petitioner remains subject to regulation only as mandated by the FWPCA and the laws of New York. Its liability for wrongful conduct which creates a nuisance to its neighboring lakeside property owners does not intrude upon that regulatory scheme. The common law of nuisance, as applied to private disputes, does not "implicate the regulatory powers of the states in which the parties are located." *Ouellette*, 602 F.Supp. at 271 (A18). Rather, compensatory damages simply compensate for injuries, leaving the wrongdoer "free to operate so long as it pays for the injury it causes." *Id.* Injunctive relief, by the same token, "is designed primarily to redress a plaintiff's particular injury. . . . A

state's nuisance law develops not to regulate the activity of neighboring states but to protect the health, welfare, and property rights of its own residents." *Id.* at 271-72 (A18-19).

It is only where interstate pollution disputes arise between quasi-sovereign entities, concerning attempts by one to regulate the conduct of the other or its citizens, that federalism issues and preemption analysis come into play. That was the case in *Milwaukee I*, *II* and *III*. It is not the case in the instant dispute, and Petitioner's attempts to exploit the interstate aspect of this litigation and characterize it as raising such issues is obfuscatory and misleading.

As such, the Second Circuit, in affirming the District Court decision, rejected Petitioner's contention that the FWPCA in any way bars or hinders the instant action:

> Given the state of the law during the time of the FWPCA's framing, it is completely reasonable to assume that Congress believed that a plaintiff suffering in State A might sue under the laws of State A to recover for injuries sustained as the result of pollution emanating from State B. It thus seems inescapable that Congress, by passage of the FWPCA's saving clause and state authority provisions, intended to preserve just such an action.

Ouellette, 602 F.Supp. at 270 (A15).

The Court buttressed its conclusion by recognizing that the application of traditional common law remedies for nuisance would *not* interfere with the objectives of the FWPCA.

> Congress, in passing the Act sought "to restore and maintain the natural chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants into

> navigable waters. S.Rep. 92-414, 92d Cong., 2d Sess. 81, *reprinted in U.S. Code Cong. & Ad. News* 3668, 3678. To this end, states' imposition of compensatory damage awards and other equitable relief for injuries caused by discharges into interstate waters merely *supplement* the standards and limitations imposed by the Act.

Id. (emphasis in original) (A17).

Finally, the Court emphasized that permitting this private nuisance action to proceed under state law would not interfere with Petitioner's "right" to discharge under its NPDES permit:

> [T]here is no indication that Congress ever intended that the NPDES permit confer an absolute right to discharge to the extent allowed by the permit. Since compliance with the Act does not constitute a defense to a common law action for damages, *see* S.Rep. 92-414, *supra*, Congress must have recognized that some uncertainty would result to dischargers of pollutants. The goal of FWPCA is not finality; rather, it is the elimination of the discharge of pollutants.

Id. at 271 (A17-18).

In adopting the sound and careful analysis employed by the District Court, the Second Circuit properly concluded that the instant case is wholly distinguishable on its facts from the case before the Seventh Circuit. As such, legal conclusions reached by the Seventh Circuit are not applicable here. On this basis, the Second Circuit has allowed Respondents' state common law claims to proceed in the courts and under the laws of Vermont, the state of injury. The Circuit Court decision is not only distinguishable from that of the Seventh Circuit, but is consistent with prior decisions of this Court. For all these reasons, the petition for certiorari should be denied.

Conclusion

Respondents respectfully submit that the petition for certiorari should be denied in all respects.

Respectfully submitted,

PETER F. LANGROCK
EMILY J. JOSELSON
LANGROCK SPERRY PARKER
& WOOL
Attorneys for Respondents
Drawer 351
Middlebury, Vermont 05753
(802) 388-6356

JEFFREY L. AMESTOY
Attorney General
MERIDETH WRIGHT
Assistant Attorney General
Attorneys for State of Vermont
as class member
Pavilion Building
Montpelier, Vermont 05602
(802) 828-3171